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RESPONSE REQUESTED

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NO. 90-6113

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

RANDALL D. WHITE,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court of Illinois,
Fourth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
THE ISSUE LEFT OPEN IN IDAHO v. WRIGHT IS NOT PRESENTED IN THE INSTANT CASE	2
CONCLUSION	5

TABLE OF AUTHORITIES

Cases	Page
Ohio v. Roberts, 448 U.S. 56 (1980)	2
United States v. Inadi, 475 U.S. 387 (1986)	2,3
People v. White, 198 Ill.App.3d 641 (4th Dist. 1990)	3
Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 3139 (1990)	3
State v. Boston, 46 Ohio St. 3d 108, 545 N.E.2d 1220 (Ohio, 1989)	4
State v. Palomo, 113 Wash.2d 789, 783 P.2d 575 (1989)	4
State v. Gallagher, 554 A.2d 221 (Vt. 1988)	4
Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (1987)	4
Manocchio v. Moran, 919 F.2d 770 (1st Cir. 1990)	4
Graham, Handbook of Federal Evidence, (West 1991)	4
Jonakait, Restoring The Confrontation Clause To The Sixth Amendment, 35 U.S.L.A. L.Rev. 557 (1988)	4

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STATEMENT OF THE CASE

Randall White was convicted of aggravated criminal sexual assault, residential burglary, and unlawful restraint. He was sentenced to concurrent terms of ten years imprisonment for aggravated criminal sexual assault, six years imprisonment for residential burglary, and two years imprisonment for unlawful restraint.

Mr. White's convictions were affirmed on direct appeal in an opinion reported at 198 Ill.App.3d 641, 555 N.E.2d 1241 (4th Dist. 1990). The opinion sets forth the facts applicable to the trial by jury, which are not in dispute.

On direct appeal, Mr. White contended that admission of certain hearsay statements violated his Sixth Amendment right under the Confrontation Clause. Specifically he argued that, under Ohio v. Roberts, 448 U.S. 56 (1980), the prosecution must always either produce the declarant for cross-examination or demonstrate her unavailability even where the evidence would otherwise be admissible under a firmly rooted hearsay exception. The appellate court rejected this argument based on United States v. Inadi, 475 U.S. 387 (1986). People v. White, 198 Ill.App.3d 641, 656-57, 555 N.E.2d 1241, 1251 (1990).

The Illinois Supreme Court denied leave to appeal this issue.

REASONS FOR DENYING THE WRIT

THE ISSUE LEFT OPEN IN IDAHO v. WRIGHT IS NOT PRESENTED IN THE INSTANT CASE.

In Ohio v. Roberts, 448 U.S. 56 (1980) this Court considered whether admission of evidence under a prior testimony exception to the hearsay rule had violated the defendant's rights under the Confrontation Clause. The Court stated the Confrontation Clause restrictions on hearsay evidence normally requires a showing that the declarant is unavailable. Id. at 66. Then the out of court statement is admissible only if it bears sufficient indicia of reliability - either falling within a firmly rooted hearsay exception or showing particularized guarantees of trustworthiness. Id.

In United States v. Inadi, 475 U.S. 387 (1986), this Court determined that the Confrontation Clause did not require a showing of unavailability for statements otherwise admissible under Federal Rules of Evidence 801(d)(2)(E). The Third District Court of Appeals had viewed language in Roberts as setting forth a clear constitutional rule requiring a showing of unavailability before any hearsay can be admitted. Id. at 392. This court held that Roberts did not stand for such a radical proposition or wholesale revision of the law of evidence. Id., at 392-94.

In Idaho v. Wright, ___ U.S. ___, 110 S.Ct. 3139 (1990), this Court considered whether the Confrontation Clause was violated by admission of evidence under Idaho's residual hearsay exception. 803(24). This rule, like the equivalent federal rule, was not a firmly rooted exception to the hearsay rule. Id., at ___, 110 S.Ct. at 3147. This Court left open the question whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires a showing of unavailability. Id.

The instant case also involves out of court statements by a child, but these statements were admitted under two firmly rooted exceptions to the hearsay rule - excited utterance/ spontaneous declarations and medical diagnosis/treatment. People v. Randall White, 198 Ill.App.3d 641, 648-56, 555 N.E.2d 1241, 1246-1251. Unlike the "residual exceptions", these are both firmly rooted exceptions. Idaho v. Wright, ___ U.S. ___, 110 S.Ct. at 3149. Both of these exceptions traditionally require no showing of unavailability. Federal Rules of Evidence 803(1) and

(4); 56 F.R.P. 183, 303-306. Other States evidence rules are similar. See e.g. State v. Boston, 46 Ohio St. 3d 108, ___, 545 N.E.1d 1220, 1230, n. 5, 1232-22 (Ohio 1989); State v. Palomo, 113 Wash. 2d 789, ___, 783 P.2d 575, 578-79 (1989).

Illinois, like many States, has adopted a statutory hearsay exception specifically for child victims of sexual abuse. Ill. Rev. Stat., ch. 38, par. 115-10. Compare State v. Galagher, 554 A.2d 221 (Va. 1988); Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (Ark. 1987). That exception is not at issue in this case. People v. White, 198 Ill.App.3d 641, 660, 555 N.E.2d 1241, 1253 (Ill.App. 4th Dist. 1990). Illinois does not have an exception equivalent to Idaho or Federal Rule 803(24). Therefore, the instant case does not present the question left open in Wright.

In the state appellate court, the petitioner urged that Roberts imposed a constitutional requirement of unavailability on all hearsay exceptions. People v. White, 198 Ill.App.3d 641, 656, 555 N.E.2d 1241, 1251 (1990). This Court has already answered that question in the negative in Inadi. See Graham Handbook Of Federal Evidence, sec. 802.2, p. 822 (West. 1991); Manocchio v. Moran, 919 F.2d 770, 774 (1st Cir. 1990); Jonakait, Restoring The Confrontation Clause To The Sixth Amendment, 35 U.C.L.A.L.Rev. 557, 561 (1988). Therefore, there is no compelling reason for this Court to review the instant case.

CONCLUSION

WHEREFORE, for all the foregoing reasons, respondent respectfully requests that this Court deny the petition for certiorari in the instant cause.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

TO; Gary R. Peterson, Assistant Defender
Office of the State Appellate Defender
400 S. 9th Street, Suite 102
P. O. Box 5750
Springfield, IL 62705-5750

PLEASE TAKE NOTICE that on February 13, 1991, I have filed with the Clerk of the Supreme Court of the United States twelve (12) copies of Respondent's Brief in Opposition in the above entitled cause.

ROLAND W. BURRIS
Attorney General
State of Illinois

By: Douglas K. Smith
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The undersigned being duly sworn on oath, deposes and states that a copy of the attached Notice and one (1) copy of Respondent's Brief in Opposition was served on the above named on February 13, 1991 by depositing same in the United States mail at 500 South Second Street, Springfield, Illinois.

Douglas K. Smith

SUBSCRIBED and SWORN to before
me this 13th day of February, 1991.

Helen L. Radigan
Notary Public

OFFICIAL SEAL
HELEN L. RADIGAN
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 12-3-92